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September 18, 2020

Via FOIAonline submission

Regional Freedom of Information Officer
U.S. EPA, Region 3
1650 Arch Street (3RC70)
Philadelphia, PA 19103
(215) 814-2050

Re: Freedom of Information Act Request for Records Relating to Status of the Consent Decree in the matter of *United States and Commonwealth of Pennsylvania Department of Environmental Protection v. City of Harrisburg; Capital Region Water*, Civil Action No. 1:15-cv-00921-WWC (M.D. Pa.) relating to alleged violations of the Clean Water Act from Harrisburg's Municipal Waste Water Treatment Plant and Conveyance System

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, the Environmental Integrity Project requests any and all records, from September 18, 2019 through the present, in the possession, control, or custody of the U.S. Environmental Protection Agency ("EPA") regarding the matter of *United States and Commonwealth of Pennsylvania Department of Environmental Protection v. City of Harrisburg; Capital Region Water*, Civil Action No. 1:15-cv-00921-WWC (M.D. Pa.) relating to alleged violations of the Clean Water Act from Harrisburg's Municipal Waste Water Treatment Plant and Conveyance System, for which a partial consent decree was lodged on February 10, 2015, as follows:

1. Records related to the status, progress, and/or target date(s) for completion of a new, modified and/or final consent decree; and
2. Records related to any and all meetings, phone calls, or video conference calls within this time frame between or among parties to the Partial Consent Decree, including any records relating to meeting dates, meeting attendees, agendas, email invitations to meetings, calendars, and any other records containing any information related to meetings among or between parties to the consent decree regarding the implementation, status, completion date, or drafting of a new, modified and/or final version of the consent decree.

Given the constraints of in-person reviews amidst the current COVID-19 restrictions, we request that all responsive documents be provided in electronic format.

Format of Records

For purposes of this request, the term “records” means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letter, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, photographs, minutes of meetings, electronic records of meetings, and any other compilation of data from which information can be obtained.

Claims of Exemption from Disclosure

If you regard any documents as exempt from required disclosure under FOIA, please exercise your discretion to disclose them nevertheless, keeping in mind that FOIA “is the most prominent expression of a profound national commitment to ensuring an open Government” and that “[a]ll agencies should adopt a presumption in favor of disclosure.” President Barack Obama, Memorandum For the Heads of Executive Departments and Agencies: Freedom of Information Act, 74 Fed. Reg. 4, 863 (Jan. 26, 2009).

In the alternative, after careful review for the purpose of determining whether any of the information is exempt from disclosure, please provide all reasonably non-exempt portions of records and communications as required by FOIA.

Should you elect to invoke an exemption, please provide the required full or partial denial letter and sufficient information to determine whether or not there may be grounds to appeal EPA’s decision. In accordance with the minimum requirements and regulations of due process, this information should include:

- Basic factual material, including the originator, date, length, and addresses of the withheld items.
- Explanations and justifications for denial, including the identification of the exemption applicable to the withheld information or portions of the information found to be subject to exemption, and how each exemption applies to the withheld material.

Request for Fee Waiver

Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and EPA’s implementing regulations, 40 C.F.R. § 2.107(l), we request that all charges incurred in connection with this FOIA request be waived. FOIA requires agencies to waive or reduce fees for requests “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). “[A]ll public interest groups...will be able to qualify for fee waivers and thereby obtain documents without charge if their requests meet the standard for waivers.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. 29,696 (1986) (statement of Rep. English)). Congress intended the fee waiver provision to be “liberally construed in favor of waivers for noncommercial requesters.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (quoting 132 Cong. Rec. 27,190 (1986) (statement of Sen. Leahy)).

As discussed below, this FOIA request satisfies the two-pronged test for a fee waiver established in FOIA and outlined in EPA's implementing regulations because: (i) "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government," and (ii) disclosure of the information "is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). *See also* EPA, Requesting FOIA Fee Waivers, <https://www.epa.gov/foia/requesting-foia-fee-waivers> (accessed Sept. 17, 2020).

A. Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of the operations or activities of government.

Requesters qualify for the fee waiver because the requested information will "contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1), (2). Specifically, our request meets each of the four factors that EPA considers with respect to the "public understanding" prong. *See* 40 C.F.R. § 2.107(l)(2).

- 1. Factor 1. The subject of the request:** *Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote.*

This request seeks records related to the operations or activities of the EPA, an independent executive agency of the federal government (as well as the Pennsylvania DEP and the City of Harrisburg and Capital Regional Water) regarding implementation of the 2015 partial consent decree and finalization of a final consent decree to address polluted discharges of sewer wastewaters from the City of Harrisburg and the timeframes thereof.

- 2. Factor 2. The informative value of the information to be disclosed:** *Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.*

The principal purpose of this request is to better understand the process that EPA, in coordination with state and local agencies and authorities, is taking to implement and finalize a consent decree to address sewer wastewater discharges from the municipal sewage system for the City of Harrisburg. The measures being taken and the timeline for adoption of a final consent decree is important for the protection of health and the environment from discharges of bacteria,

fecal matter, and other dangerous substances into Pennsylvania's waters. The information sought is not otherwise in the public domain.

3. ***Factor 3. The contribution to an understanding of the subject by the public is likely to result from disclosure:*** *Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.*

The information requested is sought to better understand the EPA's process for implementing the 2015 consent decree for sewage wastewater discharges from the City of Harrisburg and the timeline and contents of the final consent decree, which EIP intends to share with the Lower Susquehanna Riverkeeper and interested members of the public as well as to the media for broad public understanding of the process and timelines. EIP is a non-profit, non-partisan watchdog organization that advocates for effective enforcement of environmental laws. Comprised of former EPA enforcement attorneys, EIP is engaged in educating the public about environmental issues and/or taking legal or other actions necessary to ensure compliance with federal environmental laws. EIP frequently uses information it obtains through FOIA requests to analyze and simplify public information on environmental issues through the issuance of reports that are covered by media sources. In fact, EIP has a long, demonstrated, and continuing history of expertise and contribution to the public understanding on a number of topics pertaining to governmental operations. In furtherance of this, EIP distributes information via regularly published reports and press releases, its frequently updated website (<http://www.environmentalintegrity.org>) and social media platforms (<https://twitter.com/EIPOnline>; <https://www.facebook.com/EnvIntegrity/>), communication with partner organizations and outside media outlets, and legal and administrative documents such as public comments on agency rulemakings and permits and briefs and documents filed in litigation. EIP intends to make the same dissemination in this instance. More specifically, EIP plans to publish the records and our findings on its websites and to disseminate the materials to both national media sources and local outlets in Pennsylvania and the Chesapeake Bay watershed. EIP also intend to email the materials to national, regional, and local partner organizations for further dissemination to their members.

In fact, EIP has already released several reports concerning sewage discharges from the City of Harrisburg and the information collected will be used to further educate the public. EIP intends to convey this information to the public, including citizens, elected officials, policy makers, and the regulated community, in reports, position papers, interactions with the press, and other means of distribution. The Environmental Integrity Project uses its expertise to gather and publicly distribute information related to human health and the environment in a manner that is clear, transparent, and accurate.

4. ***Factor 4. The significance of the contribution to public understanding:*** *Whether the disclosure is likely to contribute "significantly" to public understanding of*

government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced significantly by the disclosure. The FOI Office will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

There is no publicly available database or other information source that is currently disclosing the progress of EPA, DEP, the City of Harrisburg, and Capital Region Water on finalizing a consent decree for sewage discharges for the City of Harrisburg, so obtaining any information on this process will contribute "significantly" to public understanding of government activities with regard to this consent decree process.

B. Disclosure of the information "is not primarily in the commercial interest of the requester."

As to FOIA's second prong for fee waivers—disclosure of the information "is not primarily in the commercial interest of the requester"—EPA regulations set out two factors for the agency to consider. 40 C.F.R. § 2.107(l)(3). This request clearly meets both of these factors.

- 1. Factor 5. The existence and magnitude of a commercial interest:*** *Whether the requester has a commercial interest that would be furthered by the requested disclosure. The FOI Office will consider any commercial interest of the requester or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters will be given an opportunity in the administrative process to provide explanatory information regarding this consideration.*

The information delivered in response to this request will not be used for any commercial purpose, business, trade, or profit. The requestor is a public interest organization that does not have a commercial interest in this material.

- 2. Factor 6. The primary interest in disclosure:*** *Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure that disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. FOI Offices ordinarily will presume that when a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.*

This factor is satisfied because the Environmental Integrity Project has no commercial interest in disclosing the records sought; EIP's interest in this material is a public interest in

obtaining and disseminating important information that will affect public health and the environment regarding the process and progress of EPA's finalization of a consent decree to address untreated sewage discharges from the City of Harrisburg.

For the above reasons, this request satisfies the fee waiver standards set forth in 40 C.F.R. § 2.107. However, in the event that EPA does not grant the requested waiver, please provide information concerning the specific basis for such a decision as required by EPA regulations as well as an estimate of the cost of the agency's response.

Please provide responsive documents in an electronic format.

Thank you for your prompt attention to this matter. Should you need further information or have any questions concerning this request or that would allow you to clarify or limit this request, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink that reads "Lisa Hallowell". The signature is cursive and fluid.

Lisa Hallowell
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